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Supreme Court, U.S.
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No. 02-524

In The
Supreme Court of the United States

JANETTE PRICE,

Petitioner,

v.

DUYONNE ANDRE VINCENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

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16 pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. The standard of review of 28 U.S.C. § 2254 is a constraint on the federal courts' power to grant relief, and it must be applied in this case	1
II. The state court decision was not contrary to clearly established United States Supreme Court law	8
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Kovacs v. Cooper, 336 U.S. 77 (1949)..... 9

Miller-El v. Cockrell, ___ U.S. ___, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003)..... 4

People v. Vincent, 455 Mich. 110, 565 N.W.2d 629 (1997)..... 5

People v. Vincent, 456 Mich. 1201 (1997)..... 4

Sanabria v. United States, 437 U.S. 54 (1978).....8, 9, 10

Smalis v. Pennsylvania, 476 U.S. 140 (1986).....10, 11

Vincent v. Jones, 292 F.3d 506 (6th Cir. 2002)..... 2

Williams v. Taylor, 529 U.S. 362 (2000) 2, 10

Woodford v. Visciotti, ___ U.S. ___, 123 S. Ct. 357, 154 L.Ed.2d 279 (2002)..... 2

STATUTES

28 U.S.C. § 2254.....1, 12

28 U.S.C. § 2254(d) 2, 7, 13

28 U.S.C. § 2254(d)(1).....2, 3, 5

28 U.S.C. § 2254(d)(2).....3, 4

28 U.S.C. § 2254(e)(1) 3, 4

I. The standard of review of 28 U.S.C. § 2254 is a constraint on the federal courts' power to grant relief, and it must be applied in this case.

Respondent claims this Court should not apply the standard of review of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), to this case for two reasons: (A) because Petitioner "never challenged in either the Sixth Circuit or this Court the district court's application of the AEDPA standard of review to the Michigan Supreme Court's legal conclusions," (See Respondent's Brief, p. 15); and (B) because "Respondent has no burden to show that a state court decision ***in his favor*** is contrary to, or an unreasonable application of, this Court's precedents." (See Respondent's Brief, p. 25).

A. Petitioner did challenge the district court's application of the AEDPA standard of review.

Respondent's claim on the first point is wrong on the facts and the applicable law. Respondent appears to be arguing: because Petitioner characterized the question before the Michigan Supreme Court as a legal issue, rather than a factual one, the AEDPA does not apply to this habeas action. Petitioner clearly raised the applicability of the habeas standard before the Sixth Circuit where the two arguments raised in Petitioner's brief on appeal in that court were as follows:

> I. The Michigan Supreme Court's conclusion that the trial court's statements were ambiguous was not based on an unreasonable determination of the facts.

II. Even if the trial court had granted Petitioner's motion for directed verdict, but reversed itself before informing the jury or conducting further proceedings, clearly established Supreme Court law does not entitle Petitioner to habeas corpus relief.

[Final Brief of Respondent-Appellant, p. 2, *Vincent v. Jones*, 292 F.3d 506 (6th Cir. 2002)].

More important, Respondent's argument misperceives the nature of federal habeas review under the AEDPA. It is not Petitioner's burden to affirmatively plead the restrictions imposed by the statute as a condition precedent to prevent the federal courts from releasing state-convicted felons. The standard of review in 28 U.S.C. § 2254 is not a benefit to be claimed by the state, it is a limitation imposed by Congress on the power of the federal judiciary. The statute provides that relief *shall not be granted* with respect to any claim that was adjudicated on the merits in state court proceedings *unless* the adjudication of the claim resulted in a decision that was contrary to, or an unreasonable application of, clearly established United States Supreme Court law. 28 U.S.C. § 2254(d)(1) (emphasis added).

As this Court stated in *Williams v. Taylor,* 529 U.S. 362, 412 (2000): "2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *See also, Woodford v. Visciotti,* ___ U.S. ___, 123 S. Ct. 357, 154 L.Ed.2d 279 (2002), where this Court refers to the "limits imposed on federal habeas review by 28 U.S.C. § 2254(d)." The lower federal courts exceeded the limits imposed by

Congress in the AEDPA by granting habeas relief in this case and this Court must reverse.

In the Court of Appeals, as in this Court, Petitioner asserted that the Michigan Supreme Court's decision in this case was based on a factual conclusion, that Vincent's motion was not granted by the trial court. If this Court accepts that contention, the case is governed by the factual determination standard of § 2254(d)(2), and habeas relief is available only if this Court finds that the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented." Conversely, even if this Court adopts the position that the Michigan Supreme Court's decision was a legal conclusion, that the words of the trial judge on March 31 did not constitute an acquittal for purposes of the Double Jeopardy Clause, then that question was adjudicated on the merits in the state court. The AEDPA allows relief only if the state court decision was "contrary to or an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A federal court cannot, as the Sixth did here, disregard the deferential review mandated by Congress.

Finally, Respondent's burden to meet the mandated statutory grounds for habeas relief is not altered because Petitioner also argued in the Sixth Circuit that the state is entitled to the presumption of correctness of factual findings in § 2254(e)(1) of the statute:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant

> shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

In the present case, in which a single factual determination by the state court resolves the claim, the application of the presumption is dispositive if not rebutted.[1] As this Court concluded in *Miller-El v. Cockrell*, ___ U.S. ___, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003), to secure relief, a habeas petitioner must show that the court's factual finding was incorrect by clear and convincing evidence under § 2254(e)(1) and that the court's decision was objectively reasonable in light of the record under § 2254(d)(2). *Id.* slip op. at 47. Therefore, the fact that the state grounded its claim regarding the factual basis for the state court's decision on § 2254(e)(1) in the appeals court does not relieve Respondent of the burden mandated by the statute. There is nothing in this record or in the language of the AEDPA which would allow Respondent to avoid the burden of showing entitlement to relief.

[1] Respondent attempts to rebut the factual conclusion with a docket entry. It must be presumed that the state court considered the docket entry, brought to its attention on reconsideration, and was unconvinced. *People v. Vincent*, 456 Mich. 1201 (1997). Further, as discussed in Petitioner's brief, p. 27, the docket entry does not constitute clear and convincing evidence since the entries for April 1 and 2, 1992 do not accurately reflect what happened in court on those dates. The March 31 docket entry is, therefore, insufficient to rebut the presumption of correctness of the state court's conclusion that the motion was not granted.

B. There was no state court decision in Respondent's favor.

Respondent wrongly contends that the standard of review of § 2254(d)(1) is not applicable. Respondent argues the Michigan Supreme Court held, in his favor, that the trial court could not have reconsidered the motion once granted. Respondent is wrong for two reasons. First, Respondent did not receive a favorable decision on that issue. Second, the "decision" referred to in § 2254(d)(1) is the decision on the merits of the claim denying relief.

According to Respondent, the Michigan Supreme Court found that if the trial court granted the motion on March 31, further proceedings would have been barred. Respondent relies on the following statement from that Court's opinion:

> "Characterizing the court's comments as a directed verdict would compel us to overturn the Defendant's convictions." [*People v. Vincent*, 455 Mich. 110, 119-120, 565 N.W.2d 629 (1997)]

Respondent's claim ignores footnote 4 of the Michigan Supreme Court's opinion specifically stating that it was *not* reaching that issue:

> n4 Because we have determined that in this case a judgment was not rendered, we need not reach whether or under what circumstances the judge can reverse or correct a ruling. However, we are aware that there is a split of authority among our sister states on this particular question. Compare *United States* v. *Washington*, 48 F.3d 73, 79 (CA2, 1995) ("oral grant of a motion for acquittal is 'no more than an interlocutory order,' which the court has 'inherent power to reconsider and modify . . . prior to the entry of judgment'"

[citation omitted]); *In Re Lionel F.*, 76 N.Y. 2d 747, 749; 559 N.Y.S. 2d 228; 558 N.E.2d 30 (1990) ("There is no constitutional impediment to a court's power to modify its decisions, provided such a modification does not subject an individual to double jeopardy" [citation omitted]); *People v. Dist Court,* 663 P.2d 616, 621 (Colo, 1983) ("we see no reason why the double jeopardy prohibition should preclude a trial judge from correcting during the trial itself an erroneous ruling on a motion for a judgment of acquittal when no threat of retrial would arise from the correction and the accused has suffered no demonstrable prejudice by reason of the correction"); *State v. Iovino,* 524 A.2d 556, 560 (RI, 1987) ("the corrected ruling by the trial justice did not in any way inhibit defendant's presentation of any evidence that he might have chosen to adduce in respect to the greater as well as the lesser included offenses"); with *Watson v. State,* 410 So.2d 207, 209 (Fla, 1982) ("the ruling of the trial judge made the day before, without any indication that the matter was still under consideration, had progressed toward finality beyond the point that would permit its retraction or correction"); *Brooks v. State,* 308 Ark. 660, 668; 827 S.W.2d 119 (1992) ("dismissing the robbery charge and then reinstating it at the conclusion of all evidence could well have curtailed the appellant's ability to present a full defense to this charge"). [*Id.* at 118, Pet. App. p. 33a].

Viewing the statement that Respondent relies on in conjunction with the footnote expressly declining to reach the issue, it is clear that when the Michigan Supreme Court stated, "characterizing the court's comments as a directed verdict would compel us to overturn the

defendant's conviction," it was merely restating the unremarkable proposition that a directed verdict is an acquittal under Michigan law. Respondent's claim that the Michigan Supreme Court "affirmatively rejected" the proposition that a trial judge could alter a ruling in some circumstances is a gross misreading of the court's opinion. The Michigan Supreme Court did not rule on the issue because it concluded that it did not have to.

Moreover, the AEDPA does not direct the federal courts to parse state court opinions, applying the deferential standard only to "issues" forming the basis of state court decisions and declining to apply deference if the state court's decision relied on the wrong "issue." The AEDPA prohibits relief on any claim adjudicated on the merits unless the adjudication of the claim resulted in a decision that was contrary to, or an unreasonable application of, this Court's clearly established law. Respondent's claim was that the trial court violated his right under the Double Jeopardy Clause not to be tried twice for the same crime. That claim was adjudicated on the merits by the Michigan Supreme Court, and the decision the court made was that Respondent's right not to be placed twice in jeopardy was not violated. The federal habeas statute provides the authority to reject that state court decision *only* under the standard of § 2254(d).

The parties agree that the Michigan Supreme Court concluded that Vincent's double jeopardy right was not violated because he was not acquitted on March 31. The Michigan Supreme Court saw the issue as requiring the following analysis: 1) was the motion for directed verdict granted on March 31 and, 2) if so, could the trial judge change his mind the next morning or was the granting of the order an acquittal immediately? The state court

resolved the issue on the first question, concluding that the motion was not granted and therefore, did not reach the second question of reconsideration.

Even if this Court agrees with Respondent that only a single, all-encompassing question was at issue, the federal courts are still constrained by the AEDPA. The statute does not require the federal court to endorse a state court opinion with its stamp of approval, only to determine whether the decision denying relief was contrary to, or an unreasonable application of the Supreme Court's prior decisions. Under Respondent's formulation, similarly situated prisoners could receive different outcomes in federal habeas review based solely on the way the state court framed its opinion. The state court decision in this case was that Respondent's double jeopardy rights had not been violated, accordingly the federal courts were obligated to observe the constraints imposed by the AEDPA on its judicial power to grant relief in habeas cases.

II. The state court decision was not contrary to clearly established United States Supreme Court law.

A. The trial court's decision was not contrary to *Sanabria v. United States*, 437 U.S. 54 (1978).

Respondent's brief states as follows:

> The trial judge took the position, *as a matter of double jeopardy law* that although he had made a ruling and granted a motion for directed verdict, such a ruling does not ripen into an acquittal until the judge informs the jury. J.A. 33, 34, 36, 42-43. The trial judge's position was wrong,

> *as a matter of double jeopardy law,* because it is directly contrary to *Sanabria v. United States,* 437 U.S. 54, 64 n. 18 (1978), where this Court held that, [i]t is without constitutional significance that the court entered a judgment of acquittal rather than directing the jury to bring in a verdict of acquittal or giving it erroneous instructions that resulted in an acquittal. [See Respondent's brief p. 16]

Assuming, for the sake of argument, the accuracy of Respondent's description of the trial judge's position, his contention that this position was contrary to the "holding" in the *Sanabria* footnote is wrong. As an initial matter, the notion that this Court announces its holdings in footnotes is questionable at best. See *Kovacs v. Cooper,* 336 U.S. 77, 90-91 (1949) (concurring opinion of Frankfurter, J.). More important, the Court in *Sanabria* neither considered nor decided whether a trial judge could reconsider a grant of a motion for directed verdict or whether the fact that the jury had not been informed of the grant would allow reconsideration. The trial court in *Sanabria* had, in fact, concluded that its decision was subject to reconsideration, but declined to alter its ruling. 437 U.S. at 59-60 and n. 9. Therefore, the reconsideration itself was not at issue. The issue in *Sanabria,* as in most double jeopardy cases reaching this Court, was whether the government was entitled to appeal an acquittal. The government claimed that the defendant's retrial on a theory of participating in a criminal gambling enterprise involving numbers betting would not violate the Double Jeopardy Clause where defendant had been acquitted of participating in the same enterprise involving horse racing. This Court held that although the trial court judge had made an erroneous ruling excluding evidence of numbers betting and had

then entered an order of acquittal, the defendant could not be retried, and therefore the prosecutor's appeal was barred. The footnote only referred to the fact that the defendant had been acquitted by the order of the trial court judge, and not by a verdict of the jury. *Sanabria* has no particular applicability to this case. Because the trial court's conclusion did not apply a rule that contradicts the governing law in *Sanabria*, and did not confront a set of facts materially indistinguishable from *Sanabria*, the state trial court's position cannot be termed "contrary to" *Sanabria*. See, *Williams v. Taylor*, 529 U.S. 405-406.

B. The Michigan Supreme Court's decision was not contrary to *Smalis*.

Respondent contends that the Michigan Supreme Court's decision that the trial court did not grant a directed verdict was a legal conclusion contrary to *Smalis v. Pennsylvania*, 476 U.S. 140 (1986). Petitioner claims that the state court's decision was based on a factual conclusion that the motion was not granted. This Court will resolve the issue whether the state court decision was based on a factual determination or was a legal conclusion.

Resolving the nature of the question presented to the Michigan Supreme Court does not end the inquiry, however. Whether the question is viewed as a legal or a factual one, it is the *resolution* of the question that the federal court must consider on habeas review. Therefore, even if this Court accepts Respondent's contention that the question is one of law and not one of fact, *Smalis* provides no framework whatsoever for resolving the question whether the trial court did or did not acquit the Respondent. Respondent states that *Smalis* holds that the

"characterization of a trial judge's words and actions as a matter of double jeopardy law is by definition, a legal matter." (See Respondent's brief, p. 15). What the *Smalis* Court actually said, in a footnote, is "the Pennsylvania Supreme Court's characterization as a matter of double jeopardy law, of *an order* granting a demurrer is not binding on us." *Smalis, supra* 476 U.S. at 144, n. 5. It was the legal effect of the order that was at issue in *Smalis*, not the resolution of ambiguous "words and actions." *Smalis* provides no guidance at all in construing "words and actions" to determine whether an order was made. Therefore, the Michigan Supreme Court's resolution of the effect of the trial court's words cannot be contrary to *Smalis* because *Smalis* does not announce a rule for resolving such ambiguities.

The question in this case, unlike the question in *Smalis*, is when does an acquittal occur? The answer to that question is not clearly established. A rule that the grant of a motion for directed verdict is an acquittal immediately, as soon as the granting words are spoken, is unworkable in practice. Respondent concedes the point, concluding that if a trial court immediately reverses the grant of a motion, it does not constitute an acquittal. (See Respondent's Brief, Argument II-D, pp. 39-45). Respondent instead proposes a rule that would hold that "jeopardy terminates after a directed verdict is announced and, if appropriate, clarified or confirmed." (*Id.*, p. 41). In Respondent's formulation a prosecutor may immediately request reconsideration, but "if the parties have moved on to other matters or a recess has been taken" jeopardy terminates. (*Id.*, p. 42). This proposed "bright line rule" is not found in *Smalis*. Respondent's proposal that this Court adopt this rule constitutes a remarkable admission that a

rule governing the issue presented on habeas review was not, and is not, clearly established by this Court. Therefore, under the standard of review of 28 U.S.C. § 2254, the state court's decision cannot be contrary to, or an unreasonable application of, United States Supreme Court law. On the other hand, even under Respondent's proposed rule, this case arguably comes within that proposal. Here the prosecutor asked the court for further consideration a mere five transcript pages after the trial court indicated its inclination to grant the motion. [Joint App. pp. 13-18]. Counsel for defendant Vincent understood the prosecutor's request:

> The Court: So the jury knows nothing about any of this.
>
> Mr. Odette: That's correct, they don't. I'm not disputing that but it's my firm impression when I left the court yesterday that there had been a ruling and that Mr. Stamos had indicated he'd like to have the matter reconsidered and I believe the Court said whatever. [Apx. pp. 33-34]

Because Respondent's counsel was well aware that the motion was not final the following morning, and because Respondent's counsel did not advocate for an immediate decision when the trial court took the motion under advisement on April 1, Respondent's theories regarding counsel's inability to prepare a defense is simply speculation. In addition, Respondent can direct this Court to no decision holding any such due process considerations are relevant to Double Jeopardy jurisprudence.

CONCLUSION

The decision of the Sixth Circuit must be reversed. The AEDPA standard requires reversal whether this Court determines that the Michigan Supreme Court's decision was based on a factual or a legal determination. If this Court adopts Respondent's position that the question decided by the Michigan State Supreme Court was a legal question, whether or not Respondent was acquitted by the words spoken by the trial judge, it is undisputed that there is no clearly established United States Supreme Court law regarding the moment an acquittal occurs and jeopardy terminates under the circumstances presented by this case. Accordingly, the limitation on the federal courts' power to grant relief imposed by 28 U.S.C. § 2254(d) requires this Court to reverse the judgment of the Sixth Circuit.

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